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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

JANE E. HODGSON, M.D.,

Appellant,

—v.—

THE STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant brings this appeal as a matter of right from the final judgment of the Supreme Court of Minnesota denying a writ of prohibition to the Ramsey County District Court.

The appeal is from a judgment of the Supreme Court of Minnesota, entered July 20, 1970, denying Appellant-Hodgson's application for a writ of prohibition to the District Court, Second Judicial District, County of Ramsey. On June 29, 1970, the state District Court had denied Appellant-Hodgson's motion to dismiss an indictment against her for having performed a therapeutic abortion in a licensed hospital at the request of a patient and her husband, where the patient had been exposed to German measles (rubella) in the early stages of pregnancy.

This is the first known felony prosecution in the United States of a qualified, licensed physician for performing a therapeutic abortion in a hospital, after extensive medical consultation, and for reasons widely recognized by the medical profession as valid.

Appellant submits this Jurisdictional Statement to show that this is an appeal as a matter of right over which this Court has jurisdiction, and that the appeal presents important and substantial federal questions which ought to be resolved by this Court.

Citation to Opinions Below

The July 20, 1970, order of the Supreme Court of Minnesota, denying Appellant-Hodgson's application for writ of prohibition, has not been reported, but is set out in Appendix A, *infra,* at 2a. The order and memorandum opinion of the state District Court, Second Judicial District, County of Ramsey, State of Minnesota, denying on June 29, 1970, Appellant-Hodgson's motion to dismiss an indictment against her for violating the anti-abortion statutes, also not reported, appears in Appendix A, *infra,* at 3a. The indictment handed down by the Grand Jury of the County of Ramsey on May 21, 1970, is reproduced in Appendix A, *infra,* at 21a.

Related federal proceedings are reported as *Doe* v. *Randall,* 314 F. Supp. 32 (D. Minn.), *rehearing denied,* 314 F. Supp. 36 (D. Minn. 1970).

Jurisdiction

(i) On May 21, 1970, thirty-five days *after* a federal complaint had been filed, in an action brought to enjoin possible prosecution,[1] the Grand Jury of the County of Ramsey indicted Appellant Jane E. Hodgson, M.D., for having performed a therapeutic abortion in violation of the Minnesota anti-abortion statute[2] (App. A, at 21a). Appellant-Hodgson moved to dismiss the indictment on the same federal constitutional grounds argued to the United States District Court in the pending affirmative suit. On June 29, 1970, the District Court, Second Judicial District, County of Ramsey, denied the motion, holding the statutes constitutionally valid (App. A, at 3a). Further, the State District Court refused to certify the questions for review by the Supreme Court of Minnesota (App. A, at 18a). August 5, 1970, was set for arraignment, and November 9, 1970, for the criminal trial.

(ii) On July 17, 1970, Appellant-Hodgson petitioned the Supreme Court of Minnesota for a writ of prohibition. The writ was denied in an order entered July 20, 1970 (App. A, at 2a). Appellant-Hodgson filed on September 14, 1970, with the State District Court, Second Judicial District, County of Ramsey, which possessed the record of state court proceedings, a Notice of Appeal to this Court (App. A, at 1a).

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[1] An appeal has been docketed this day in the federal action, *Hodgson* v. *Randall.*

[2] The statutes, set out verbatim, *infra,* at 4-5, are 40A MINN. STAT. ANN. §§617.18, -.19, at 284-87 (1964). Appellant's arguments for unconstitutionality are summarized, *infra,* at 10-24, to establish the substantiality of the federal questions.

(iii) Jurisdiction of this Court to review by appeal the order[3] of the Supreme Court of Minnesota is conferred by 28 U.S.C. §1257(2) (1964 ed.).

(iv) Cases which sustain the jurisdiction of this Court over the appeal are: *Mills* v. *Alabama,* 384 U.S. 214, 217-18 (1966); *Griswold* v. *Connecticut,* 381 U.S. 479, 480 (1965); *Poe* v. *Ullman,* 367 U.S. 497, 500-501 (1961); *Madruga* v. *Superior Court,* 346 U.S. 556, 557 & n. 1 (1954); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923).

Statutes Involved

40A MINN. STAT. ANN. §617.18, at 284 (1964):

> "Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life, or that of the child with which she is pregnant, shall
>
> (1) prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take, any medicine, drug, or substance; or
>
> (2) use, or cause to be used, any instrument or other means—
>
> Shall be guilty of abortion and punished by imprisonment in the state prison for not more than four years or in a county jail for not more than one year."

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[3] As shall more fully appear *infra,* at 25-31, the order denying a writ of prohibition was "final" for jurisdictional purposes, because the mere fact of a criminal trial under these circumstances will do irreparable injury of extraordinary magnitude to Appellant Hodgson and all other members of the medical profession in Minnesota by drastically inhibiting a wide realm of constitutionally protected conduct.

40A MINN. STAT. ANN. §617.19, at 286 (1964):

> "A pregnant woman who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, shall be punished by imprisonment in the state prison for not less than one year nor more than four years."

11 MINN. STAT. ANN. §147.02(3), at 73-74 (Supp. 1970):

> "The [Minnesota state board of medical examiners] may refuse to grant a license to, or may suspend, revoke, condition, limit, qualify or restrict the license . . . of any person guilty of immoral, dishonorable, or unprofessional conduct . . . . A suspension, revocation, condition, limitation, qualification or restriction of a license shall be in effect pending determination of the appeal unless the court, upon petition and for good cause shown, shall otherwise order.
>
> "The words 'immoral, dishonorable, or unprofessional conduct,' . . . shall mean: (1) Procuring, aiding, or abetting a criminal abortion . . . (9) Conviction of a felony . . . .
>
> "A license to practice medicine is also suspended when a licensee is convicted of the crime of abortion and remains suspended until, upon petition by the licensee, the suspension is terminated by the board after a hearing."

Other relevant Minnesota statutes, not directly in question here, which relate to distribution of information on abortion, manufacture of abortifacients, and licensure revocation for hospitals which permit abortion, are set out in Appendix C, *infra*, at 40a.

Questions Presented

I. Whether Minn. Stat. Ann. §§617.18, -.19, Which Forbid a Physician to Perform a Therapeutic Abortion, "Unless the Same is Necessary to Preserve [the Patient's] Life," Deprive Physicians and their Patients of Rights Secured by the First, Fourth, Ninth, and Fourteenth Amendments, and Are Void on their Face by Reason of Overbreadth, Because Neither Narrowly Drawn Nor Supported by Any Compelling or Legitimate State Interests.

II. Whether Minn. Stat. Ann. §§617.18, -.19, Are Unconstitutionally Vague and Indefinite on their Face, Where the Statutory Language Provides Wholly Inadequate Warning to the Physician, Patient, Judge, or Jury, of Which Physical, Mental, or Social Conditions May be Taken Into Account When Assessing Necessity.

III. Whether the Supreme Court of Minnesota Should Have Granted a Writ of Prohibition, Where the Facts Showed a Realistic Danger of Immediate and Irreparable Injury to Important Federal Rights, and Defense of State Court Prosecution Could Not Adequately Vindicate these Rights.

IV. Whether the Decision of the Supreme Court of Minnesota, Denying a Writ of Prohibition, Was a "Final Judgment" For the Purpose of Appeal to this Court.

Statement of the Case

Appellant was one of four Minnesota physicians who brought the federal action, *Hodgson* v. *Randall,* docketed on appeal to this Court as No. 728, October 1970 Term. Additional federal plaintiffs were a woman who was pregnant at the time the action was filed, and her husband. The physicians all alleged that Minnesota's anti-abortion laws severely restricted their treatment of the innumerable patients, encountered on a regular and recurring basis, who requested therapeutic abortions. They constantly have patients who request hospital therapeutic abortions. Because of the awesome felony sanctions, and equally severe sanctions such as loss of medical license and hospital privileges, these physicians must reject such patients' requests, or risk ruin. To test the validity of Minnesota's anti-abortion laws and practices, they decided to take the alternative of an action for declaratory and injunctive relief against the aforesaid statutes.

On April 14, 1970, two days before the federal complaint was filed, Jane Doe, a patient, was advised by Appellant Jane E. Hodgson, M.D., that she was pregnant. Furthermore Jane Doe had been exposed to German measles (rubella). Jane Doe herself, and her three infant children, ages five, three, and two, had all contracted German measles during the month of March, 1970.

German measles, like thalidomide, creates severe risks of innumerable defects in the embryo.

> "At present . . . the following defects are most common in cases of congenital rubella: low birth weight, cataracts, microphthalmia, retinopathy, deaf-

ness, congenital heart disease, bone lesions and psychomotor retardations. Less common, or rare, are jaundice, glaucoma, cloudy corneas, myocardial damage, hepatitis, and various forms of anemia."[4]

A pregnant woman, her husband, and her entire family could reasonably conclude that the State is asking too much when it requires her to continue a pregnancy after a rubella infection in early pregnancy has been positively identified.

Accordingly, the physician plaintiffs were joined by Jane Doe, then ten weeks pregnant, and her husband in a federal action filed April 16, 1970, to declare the Minnesota statute unconstitutional on its face, and forever to enjoin its enforcement.

Despite the urgency of expeditious action, the federal District Court did nothing for almost five weeks. Based upon medical consultations, and accepted medical practice, Appellant Jane E. Hodgson, M.D., performed a therapeutic abortion on Jane Doe April 29, 1970, in an unnamed Minnesota hospital. Further delay would have entailed great risk to the life and health of Jane Doe.[5]

On May 19, 1970, the federal District Court issued the opinion set out in Appendix B, *infra,* at 33a, and recently

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[4] D. CALLAHAN, ABORTION: LAW, CHOICE, AND MORALITY 96 (1970). Callahan, at 92-98 & nn. 2-44, fully elaborates the consequences of rubella infection, with citation to all pertinent medical authorities. These will be discussed more fully in the brief on the merits.

[5] Appellant has not and does not take the position that a therapeutic abortion was "necessary to preserve [Jane Doe's] life" within the intendment of 40A MINN. STAT. ANN. §617.18, at 284 (1964). The point here is that surgical dangers increase with duration of pregnancy, a factor not taken into account by the District Court.

reported in 314 F. Supp. at 32. The federal court denied both declaratory and injunctive relief, noting that no indictment had been returned.

Two days later a grand jury indicted Appellant Jane E. Hodgson, M.D. (App. A, at 21a). Appellant petitioned the federal District Court for rehearing, requesting again the declaratory and injunctive relief sought from the outset.

On July 1, 1970, the three-judge court, again denied relief (App. B, at 27a, 314 F. Supp. at 36). A *per curiam* opinion invoked the anti-injunction statute, 28 U.S.C. §2283 (1964 ed.), and refused again to intervene.

After indictment,[6] Appellant Hodgson moved in the state district court for dismissal of the indictment, on the same federal constitutional grounds which were central to the federal action. On June 29, 1970, the District Court, Second Judicial District, County of Ramsey, denied the motion, expressly rejecting all federal constitutional claims (App. A, at 3a). Appellant Hodgson applied to the Supreme Court of Minnesota for a writ of prohibition, again urging that the anti-abortion statutes were unconstitutional on their face. On July 20, 1970, the highest court of the State, without opinion, refused the writ (App. A, at 2a). The present appeal and an appeal also docketed this day from the federal court judgment, followed.

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[6] An examination of the legal history of abortion will show that this is the first indictment ever returned in the United States against a physician for having performed a therapeutic abortion in a hospital, for recognized medical reasons. One authority points out, moreover, the widespread performance of abortions for rubella: "During the 1964 [rubella] epidemic 329 such abortions were done in New York City alone. Although most American hospitals now permit abortions for rubella, some do not." Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967).

The Questions Are Substantial

This appeal presents important and unresolved federal questions which have not been but should be finally determined by this Court. Not only does the decision appealed from appear to be out of line with precedent from the Court, but the result below is in conflict with numerous decisions by federal and state appellate courts in other jurisdictions.[7] In addition, the appeal presents novel issues of profound national significance, affecting the lives of many thousands of American citizens each year. Further, the same issues are presented in a host of pending lower federal and state court actions.[8] The parties and courts affected need and await guidance from this Court.

Introduction

In the remainder of this Jurisdictional Statement, Appellant will show that the questions presented are substantial, and merit plenary review by the full Court. Because of the novelty and complexity of the issues, and the limited function of a Jurisdictional Statement, this showing will not undertake to develop all arguments in depth.

On the merits, Appellant contends that decisions of this Court, construing the First, Fourth, Ninth, and Fourteenth Amendments,[9] support a claim that Minnesota's anti-

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[7] *See* cases cited in notes 20-26 and accompanying text, *infra*.

[8] *See* cases listed in note 27, *infra*.

[9] In particular, Appellant relies upon the reasoning of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), where this Court invalidated a state law prohibiting use of contraceptive devices, because the law swept too broadly and invaded "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 381 U.S. at 485.

abortion statutes sweep too broadly and thereby invade rights protected by the Constitution. These rights are asserted by Appellant, as a physician, and on behalf of her patients. Moreover, the statutes in question are so vague and indefinite as to violate the Fourteenth Amendment due process guarantee of reasonably specific legislation. That guarantee is particularly significant where, as here, important personal rights are at stake, and an impermissibly vague statute operates to inhibit a wide range of constitutionally protected conduct.[10]

Ultimately, the question presented is whether a State may enact a felony statute to punish a physician, a woman, and her husband, with four years in state prison, where the couple requests, and the physician performs, a therapeutic surgical procedure to abort a pregnancy which the couple did not want, but were unable to prevent. Under *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), it is clear that a husband and wife[11] are constitutionally privileged

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[10] The most reliable estimates hold that fewer than 10,000 hospital therapeutic abortions are performed yearly, in states where there has been no abortion law reform. *See* Tietze, *Therapeutic Abortions in the United States*, 101 AM. J. OBST. & GYNEC. 784, 787 (1968). These constitute a minute proportion of all unwanted pregnancies which face American couples each year. The remainder have two alternatives: continuation of unwanted pregnancy, or extra-hospital, probably illegal, induced abortion.

[11] *Griswold* was silent on the more significant problem of access by unmarried persons to contraceptives. A result of non-access, and failure, is the birth of over 100,000 illegitimate children yearly to girls age nineteen or younger. *See* U.S. BUREAU OF THE CENSUS: *Statistical Abstract of the United States: 1969*, Table 59, at 50 (90th ed. 1969).

Outside of the state judiciary in Massachusetts, authorities have uniformly held the *Griswold* rationale applicable to litigants who had not entered into the marriage contract. *Compare Baird* v. *Eisenstadt*, —— F.2d ——, No. 7578 (1st Cir. July 6, 1970) (invalidating Massachusetts statute which outlawed distribution of

to control the size and spacing of their family by contraception. The failure of contraception, however, is commonplace.[12] Authoritative estimates are that between 750,000 and 1,000,000 births each year are unwanted.[13] These are in addition to the 200,000 to 1,000,000 unwanted pregnancies which are estimated to end in abortions induced outside of the clinical setting.[14] Taken together, some 950,000 to

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contraceptives to the unmarried), *Mindel* v. *United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Calif. 1970) (reinstating postal clerk who had been dismissed for cohabitation without benefit of marriage), *and Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam) (Texas anti-abortion statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."), *with Sturgis* v. *Attorney General*, 260 N.E. 2d 687, 690 (Mass. 1970) (directly contrary to federal decision in *Baird*).

[12] If a married couple is to have private control over numbers and spacing of children, induced abortion is absolutely necessary as a backstop to contraceptive failure. For compilation of contraceptive failure rates according to method used, see P. EHRLICH & A. EHRLICH, POPULATION RESOURCES ENVIRONMENT 218-19 & Table 9-1 (1970); N. EASTMAN & L. HELLMAN, WILLIAMS OBSTETRICS 1068-75 (13th ed. 1966); Hardin, *History and Future of Birth Control*, 10 PERSPECTIVES IN BIOLOGY & MED. 1, 7-13 (1966); Tietze, *Clinical Effectiveness of Contraceptive Methods*, 78 AM. J. OBST. & GYNEC. 650 (1959).

[13] The most recent scholarly examination of unwanted birth magnitudes will appear in a forthcoming issue of SCIENCE. A summary of these findings by Dr. Charles F. Westoff of Princeton University's Office of Population Research, analyzing the 1965 National Fertility Study, appeared in the N.Y. Times, Oct. 29, 1969, at 25, col. 3.

[14] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935).

2,000,000 unwanted births plus non-clinical abortions occur yearly. Accordingly, one must conclude that restrictive anti-abortion statutes, such as the Minnesota law in question here, drastically affect the conduct of literally millions of American citizens.

The national significance of the issues in this case can also be inferred from increased activity within the medical profession, and in the legislatures. On June 25, 1970, the House of Delegates of the American Medical Association voted to permit licensed physicians to perform abortions in hospitals, with the sole additional qualification that two other physicians be consulted.[15] Physicians were cautioned, however, not to violate existing state statutes, forty-seven of which are far more restrictive.[16] Three states in 1970—New York, Alaska, and Hawaii—removed, for the most part, any criminal penalties which might previously have been imposed upon physicians for performing abortions in appropriate medical facilities.[17] From 1967 to 1970, twelve states had adopted therapeutic abortion statutes similar to that of the MODEL PENAL CODE's 1962 Proposed Official Draft.[18] More recently, on August 4, the Commissioners on

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[15] *See* N.Y. Times, June 26, 1970, at 1, col. 1. The statement has not yet been published in an official A.M.A. document. A recent issue of the J.A.M.A. noted that only 26 physicians had resigned from the body because of new policy. 213 J.A.M.A. 1242 (Aug. 24, 1970).

[16] For analysis of abortion laws in the United States prior to the most recent changes, see Lucas, *Laws of the United States,* in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); George, *Current Abortion Laws: Proposals and Movements for Reform,* 17 W. RES. L. REV. 371 (1966).

[17] *See, e.g.,* [1970], N.Y. Laws ch. 127, at 170, *amending* N.Y. PENAL LAW §125.05(3) (McKinney 1967).

[18] *See* MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act. The Act sanctioned abortions by licensed physicians "within 24 weeks after the commencement of the pregnancy; or if after 24 weeks . . . " under the circumstances set out in the Model Penal Code proposal.

These developments bear witness to the importance of the issues presented here.

While policy-making and legislative bodies have debated the issue of abortion, courts, confined to the constitutional framework, have been asked to resolve the questions of individual privacy and legislative power which are presented here. Although the questions framed in this case have not been decided[19] by this Court, numerous federal

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[19] On at least six occasions this Court has declined to review state court decisions which involved restrictive anti-abortion laws. The present case, however, presents an ideal situation, free from factors which might detract from the merits. Here, Appellant is being prosecuted for performing a hospital abortion under circumstances long approved by the medical profession, *i.e.*, documented exposure of the patient to German measles. Moreover, this Appellant invoked federal jurisdiction long before a prosecution was commenced. Hence, it is the state courts which are interfering with federal jurisdiction, not the more difficult contrary situation.

The six denials of review mentioned above are: *Mucie* v. *Missouri*, 398 U.S. 938 (June 1, 1970), *denying cert. to* 448 S.W.2d 879 (Mo. 1970) (manslaughter abortion conviction where patient died); *California* v. *Belous*, 397 U.S. 915 (Feb. 24, 1970), *denying cert. to* 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (statute repealed after prosecution commenced); *Molinaro* v. *New Jersey*, 396 U.S. 365 (Jan. 19, 1970) (per curiam), *dismissing appeal from* 54 N.J. 246, 254 A.2d 792 (1969) (defendant jumped bail after appeal filed); *Knight* v. *Louisiana Bd. of Medical Examiners*, 395 U.S. 933 (June 2, 1969), *denying cert. to* 252 La. 889, 214 So.2d 716 (1968) (per curiam) (federal questions not properly raised and preserved); *Morin* v. *Garra*, 395 U.S. 935 (June 2, 1969), *denying cert. to* 53 N.J. 82 (1968) (per curiam) (same); *Moretti* v. *New Jersey*, 393 U.S. 952 (Nov. 18, 1968), *denying cert. to* 52 N.J. 182, 244 A.2d 499 (1968) (conspiracy conviction; abortion to have been performed by barber).

and state decisions attest to the substantiality of the federal questions. Moreover, the sometimes sharp divisions in the courts below illustrate further the need for a decision at this level. In showing that the Court has jurisdiction, and that the questions are substantial, Appellant will outline the divisions among lower courts.

I.

Minn. Stat. Ann. §§617.18, -.19, Which Forbid a Physician to Perform a Therapeutic Abortion, "Unless the Same Is Necessary to Preserve [the Patient's] Life," Deprive Physicians and Their Patients of Rights Secured by the First, Fourth, Ninth, and Fourteenth Amendments, and Are Void on Their Face by Reason of Overbreadth, Because Neither Narrowly Drawn Nor Supported by Any Compelling or Legitimate State Interests.

Point I presents the substantial federal question whether the rights asserted by Appellant are of constitutional dimension. These rights may be variously characterized.

In September, 1969, the Supreme Court of California became the first appellate court to recognize the constitutional stature of a "fundamental right of the woman to choose whether to bear children . . . ."[20] The *Belous* court

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[20] *California* v. *Belous*, 71 Cal. 2d ——, ——, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970). *Belous*, a state court appeal of a conspiracy conviction of a physician, involved a statute worded almost identically to that in the present case.

One year earlier, a California trial court had ruled that the Eighth and Fourteenth Amendments prohibited license revocation proceedings against physicians who had performed hospital approved abortions on patients exposed in early pregnancy to German

found this right implicit in this Court's "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." [21]

More recently, three different decisions by statutory three-judge federal courts have invalidated restrictions on access to medical abortion in Wisconsin, Texas, and Georgia. The first, *McCann* v. *Babbitz*,[22] recognized in that jurisdiction a woman's

> "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened." 310 F. Supp. at 302.

McCann grew out of the prosecution of a physician, but the three-judge court had no difficulty holding that a

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measles. The opinion of the trial court, however, simply enumerated those Amendments among various conclusions of law, without supporting the conclusions with any attempt at reasoned analysis. Nonetheless, the result, and the factual similarities between that and the present case, are of interest. *See Shively* v. *Board of Medical Examiners*, No. 590333 (Calif. Super. Ct., San Fran. County Sept. 24, 1968) (not reported), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery, without reference to merits).

[21] 71 Cal. 2d at ——, 458 P.2d at 199, 80 Cal. Rptr. at 359, *citing, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

[22] 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term). The prosecution in *McCann* took an appeal from the granting of a declaratory judgment to the physician. However, the physician did not appeal from denial of his request for injunctive relief, as 28 U.S.C. §1253 (1964 ed.), would seem to require. *See Mitchell* v. *Donovan*, 398 U.S. 427 (1970) (per curiam), *vacating* 300 F. Supp. 1145 (D. Minn. 1969), with directions to enter a fresh judgment of dismissal, to enable the appellants to appeal to the Eighth Circuit.

physician has standing to assert the rights of pregnant patients.[23]

The second recent federal decision, *Roe* v. *Wade*,[24] declared the Texas anti-abortion statutes unconstitutional on the similar ground that

> "they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

A third federal decision, *Doe* v. *Bolton*,[25] followed *Belous*, *McCann*, and *Roe*, holding:

> "[T]he concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.
>
> ". . . [T]he reasons for an abortion may not be proscribed. . . ."

Numerous lower courts have followed this lead, in both federal and state disputes.[26] In addition, three-judge courts

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[23] The standing of a physician to assert a patient's rights along with his own follows from *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), and *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953). On this standing point, lower court decisions involving abortion laws all agree. *See also Planned Parenthood Ass'n of Phoenix* v. *Nelson*, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Doe* v. *Bolton*, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam); *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex June 17, 1970) (per curiam); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 273 (S.D.N.Y. May 12, 1970).

[24] —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

[25] —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

[26] *See, e.g., State* v. *Munson* (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, *J.*) (recognizing the woman's " 'private decision whether to bear her unquickened

have been convened in a number of states to consider issues quite similar to those raised here.[27] The convening of a statutory court, of course, requires that the questions presented be "substantial."[28]

Scholarly commentary also recognizes that these issues are of tremendous national importance, and "substantial" in the sense of warranting determination by this Court. Retired Justice Clark addressed himself to the applicability of *Griswold* in the abortion context more than a year ago.[29] According to Justice Clark's analysis,

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child' "); *State* v. *Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid, *J.*) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment."); *Commonwealth* v. *Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970) (Campbell, *P.J.*) ("the abortion statute interferes with the individual's private right to have or not to have children."); *People* v. *Gwynne*, No. 176601 (Calif. Mun. Ct., Orange County Aug. 13, 1970) (Schwab, *J.*); *People* v. *Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County June 16, 1970) (Thomson, *J.*); *People* v. *Barksdale*, No. 33237C (Calif. Mun. Ct., Alameda County Mar. 24, 1970) (Foley, *J.*); *People* v. *Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County Jan. 9, 1970) (Mast, *J.*); *cf. United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 272-73 (S.D.N.Y. 1970) (questions substantial, but habeas petitioner-physician remitted to state courts).

[27] *See, e.g., Gwynne* v. *Hicks*, Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); *Arnold* v. *Sendak*, IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); *Corkey* v. *Edwards*, Civ. No. 2665 (W.D.N.C., filed May 12, 1970); *YWCA of Princeton* v. *Kugler*, Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970); *Hall* v. *Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot* Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed); *Benson* v. *Johnson*, Civ. No. 70-226 (D. Ore., filed Aug. 4, 1970).

[28] *Idlewild Bon Voyage Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962) (per curiam).

[29] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L. Rev. 1-11 (1969).

> "Griswold's act[30] was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention fails?" [31]

To examine Justice Clark's hypothetical question in the full constitutional context, the Court should note probable jurisdiction in this case, and set the matter down for full briefing and argument.

II.

Minn. Stat. Ann. §§617.18, -.19, Are Unconstitutionally Vague and Indefinite on Their Face, Because the Statutory Language Provides Wholly Inadequate Warning to the Physician, Patient, Judge, or Jury of Which Physical, Mental, or Social Conditions May Be Taken Into Account When Assessing Necessity.

Point II presents the substantial federal question whether the Minnesota anti-abortion statutes are so vague and indefinite as to deprive the Appellant of liberty without due process of law.

Again, an examination of the statutes, decisions previously cited, and the medical literature will show that the vagueness claim merits full review by this Court.

Not all abortions are criminal in Minnesota. An exception is made when an abortion is "necessary to preserve [the patient's] life. . . ." MINN. STAT. ANN. §§617.18, -.19, at 284, 286 (1964). The statute, however, is unclear in its

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[30] Although it is a minor point, Griswold was the Executive Director of Planned Parenthood in the *Griswold* case. It was the physician, the late Dr. Buxton of the Yale Medical School who had examined the patients and prescribed contraceptive devices.

[31] Clark, *supra* note 29, at 9.

application to common instances in which a patient requests a physician to perform an abortion. Moreover, the vagueness is not such that could be remedied by state court construction in one or two cases, because pregnant patients often present complex reasons for abortion.[32] These reasons relate to the duration and quality of the patient's life which she asks to be preserved. They include consideration of the physical and mental condition of the patient, as well as related socio-economic reasons for abortion. It is a rare case when a patient would face sudden death unless she obtained an abortion immediately. However, she and her husband may be unable to support further children, without subjecting themselves to strains which in a matter of time would ruin not only their physical and mental health, but their marriage as well.

Ultimately, the preservation of a patient's life is a matter of degree. Dangers to her life lie along a wide spectrum, from dangers on the one hand to the future quality of her life, and on the other to her immediate survival. In between are the mine run of situations where pregnancy, childbirth, and child-bearing may wreck a woman and destroy her family, or may do no more than require her to bear a fourth child, when she and her husband had attempted unsuccessfully to limit family size to three offspring.[33]

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[32] In the ninety-seven years since its initial enactment in 1873, the Minnesota anti-abortion law has been left substantially unchanged. Moreover, the numerous decisions by the Supreme Court of Minnesota construing the statute have found little fault with its language. One decision holds that the danger of the pregnant woman's death need not be "immediate." *State* v. *Hatch*, 138 Minn. 137, 138, 164 N.W. 1017 (1917). However, the same case refused to sanction an abortion where the patient was middle-aged, small boned, anemic, and had a minor heart condition.

[33] This is not to minimize the seriousness of a State invasion of the family unit which compels a married couple to bear and raise

The medical profession has no experience in applying the provisions of felony statutes to the day-to-day practice of their science. It is not an offense to perform an appendectomy far in advance of rupture, and when only necessary to prevent a risk that might never materialize. General malpractice principles, which take all circumstances into account, govern the physician's everyday practice, not the criminal law. Nor is malpractice *per se* a cause for license revocation, much less criminal prosecution, unless so serious, wanton, and reckless as to constitute criminal negligence.[34] Indeed, the physician's professional role is directed toward preserving a patient's *health*, as that term is used in its broadest sense:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.
>
> "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [35]

It would require little argument to show that preservation of "health" is too subtle a matter for the criminal law, with

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four children, when the individuals would have preferred three. As Justice Goldberg implied, concurring in *Griswold*, "totalitarian limitation of family size," particularly by way of increase, "is at complete variance with our constitutional concepts." 381 U.S. at 497.

[34] For example, Minnesota defines manslaughter in the second degree to include acts of "culpable negligence" which create an unreasonable risk "of causing death or great bodily harm to another. . . ." 40 MINN. STAT. ANN. §609.205, at 238 (1964).

[35] *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

its characteristic bluntness.[36] So too, is a blunt criminal law standard which punishes all surgical procedures of a particular variety which are not designed to preserve a patient's "life."

This Court has repeatedly stated that "[v]ague laws in any area suffer a constitutional infirmity,"[37] even though of common law or earlier vintage.[38] Furthermore, statutes which impinge upon sensitive human rights are to be more closely scrutinized. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[39] *Griswold*, it should be recalled, dealt with "a right of privacy older than the Bill of Rights. . . ."[40] That right is invoked once more in the present case.

Among the numerous lower court decisions which invalidated state abortion laws akin to the Minnesota statute, several have done so on the alternative ground that the term, "necessary to preserve" the woman's life, was unconstitutionally vague. The conclusions of those courts have been that neither physician, patient, judge, nor jury

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[36] *See United States* v. *Vuitch*, 305 F. Supp. 1032, 1034 (D.D.C. 1969):

> "The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment."

[37] *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (common law offense of "criminal libel" held void for uncertainty). *See generally* Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921).

[38] *See United States* v. *Evans*, 333 U.S. 483 (1948) (statute passed in 1917); *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) (1860 statute).

[39] *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

[40] *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965).

ought to be forced to pass judgment based upon so little guidance.

California v. *Belous*,[41] *United States* v. *Vuitch*,[42] and *Roe* v. *Wade*[43] all agree upon the analysis set out above. The few contrary decisions conclude that similar statutes are not too vague,[44] but offer no guidance to the physician who knows that such is not the case. Among the commentators, Justice Clark was fast to note the dilemma of a physician:

> "The increased number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability." [45]

Moreover, medical literature repeatedly reflects the dilemma of vague abortion laws, and the result that every hospital, abortion committee, and physician has a different understanding of the law.[46]

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[41] 71 Cal. 2d ——, ——, 458 P.2d 194, 197-99, 80 Cal. Rptr. 354, 357-59 (1969), *cert. denied*, 397 U.S. 915 (1970).

[42] 305 F. Supp. 1032, 1034 (D.D.C. 1969).

[43] —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970).

[44] *See McCann* v. *Babbitz*, 310 F. Supp. 293, 297-98 (E.D. Wis. 1970) (per curiam); *Rosen* v. *Louisiana State Bd. of Medical Examiners*, —— F. Supp. ——, Civ. No. 70-1304 (E.D. La. Aug. 7, 1970) (2-1 decision).

[45] Clark, *supra* note 29, at 7.

[46] *See, e.g.*, Tietze, *Maternal Mortality Associated With Legal Abortion*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL CONFERENCE ON PLANNED PARENTHOOD 24 (Oct. 1955) (Tokyo):

> "The application of these laws, however, varies greatly between localities and between hospitals."

(footnote continued on next page)

Accordingly, the questions raised by Point II are substantial, and require full briefing and argument before this Court.

Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967):

> "Abortion practices vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital."

M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 34-35, 52 (1958):

> "[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. * * * The current laws provide no accurate criteria by which the doctor can govern his actions."

Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. MT. SINAI HOSP. 111 (1954):

> "The doctor's dilemma lies in the phrase 'preserving the life of the woman.'"

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 423 (1959). The study is discussed and relied on in *California* v. *Belous*, 71 Cal. 2d ——, ——, 458 P.2d 194, 205 n. 14, 80 Cal. Rptr. 354, 365 n. 14 (1969).

It is not by chance that the decisions in note 44, *supra*, which rejected vagueness claims, neither discussed nor answered the contrary array of medical and legal authorities. The same authorities were brought to the attention of the courts in both *McCann* and *Rosen*, but ignored.

III.

The Supreme Court of Minnesota Should Have Granted a Writ of Prohibition, Because the Facts Showed a Realistic Danger of Immediate and Irreparable Injury to Important Federal Rights, and Defense of State Court Prosecution Could Not Adequately Vindicate These Rights.

The present case involves "a right of privacy older than the Bill of Rights—older than our political parties. . . ."[47] It involves State disruption of "the traditional relation of the family—a relation as old and as fundamental as our entire civilization. . . ."[48] Because of the sacred character of these rights, pre-trial adjudication of the merits is particularly appropriate. Otherwise, exercise of the rights will be delayed to the irreparable injury not only of Appellant and her patients, but also of all those similarly situated.

As shown above, the state District Court decided the federal constitutional questions adversely to Dr. Hodgson, and an application for writ of prohibition was made to the Supreme Court of Minnesota. The writ was denied (App. A, at 2a). In a normal instance, this error could be corrected by appeal after the criminal trial. The present case, however, is exceptional in several respects.

First, an immediate decision by the Supreme Court of Minnesota was essential at the earliest possible moment to avoid the deterrent effect which inevitably followed the state trial court's unprecedented decision. For the first

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[47] *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965).

[48] *Griswold* v. *Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, *J.*, concurring).

time in medical history, a prosecution had been brought against a physician for performing a medically indicated therapeutic abortion in a hospital, after thorough and appropriate consultation with numerous professional colleagues. Other physicians could react to the trial court's decision in only one way, by sharply limiting the availability of therapeutic abortions until the case was finally resolved. If Dr. Hodgson is correct, however, both physician and patient have federally protected rights to privacy in the abortion decision. Moreover, these rights are on a particularly high plane in the constitutional constellation. Delay, therefore, in the vindication of these rights amounts to their denial, because of the limited time in early pregnancy when a woman can safely obtain a therapeutic abortion.

Second, delay in state appellate action on this case necessarily entailed irreparable injury to Dr. Hodgson. Her only defense has been the federal constitutional rights guaranteed for her and her patients. There is no contest to the fact that the abortion was done, and that it was not necessary to preserve the life of Jane Doe. Dr. Hodgson readily admits a violation of state law, but asserts that the state law itself violates the higher, federal law. This contention, however, has already been rejected by the trial court, and will invariably be rejected if an actual trial takes place.[49]

The effect, therefore, of denying a writ of prohibition was to remit Dr. Hodgson to the trial court for an inevi-

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[49] Not only did the state trial court refuse even to acknowledge the existence of the numerous federal and state decisions to the contrary, *see* nn. 21-26 and accompanying text, *supra*, but that court showed inexcusable disregard for the important federal rights in this case by declining to certify the questions to the Supreme Court of Minnesota as "doubtful" (App. A, at 4a, 19a).

table verdict of guilty, followed by sentencing and automatic revocation of her license to practice medicine. License revocation is mandatory after an abortion conviction. 11 MINN. STAT. ANN. §147.02(3), at 73-74 (Supp. 1970). Minnesota has singled out the crime of abortion for special treatment. Upon conviction, the State Board of Medical Examiners need not act; revocation flows automatically.

Accordingly, it is clear that there is no defense to the charges at trial, and that the trial itself will do great damage to Dr. Hodgson. Moreover, greater damage will be done by the delay which will occur before a further opportunity is presented at the state appellate level to vindicate the important federal rights at issue. Under these circumstances, refusal of the writ of prohibition was equivalent in most respects to an adverse decision on the merits.

IV.

The Decision of the Supreme Court of Minnesota, Denying a Writ of Prohibition, Was a "Final Judgment" for the Purposes of Appeal to This Court.

It remains to be shown that the judgment denying a writ of prohibition was a "[f]inal judgment . . . rendered by the highest court of a State in which a decision could be had . . . ." 28 U.S.C. §1257 (1964 ed.).

In all respects which are pertinent, the judgment is final. It finally decides that Appellant Dr. Jane Hodgson must stand trial on criminal charges for having admittedly performed a therapeutic abortion. Dr. Hodgson does not con-

test that the abortion was performed, nor that it violated state law by being unnecessary to preserve Jane Doe's life, within the meaning of the statute. Already, the trial court has decided that the Minnesota anti-abortion statute may constitutionally be applied to Dr. Hodgson. No defenses remain. The trial can be no more than a series of ministerial acts, followed by a directed verdict of guilty as charged. A sentence of not more than four years must follow, and with it automatic revocation of Dr. Hodgson's license to practice medicine.

A further appeal to the Supreme Court of Minnesota is possible. Such an appeal, however, could not begin to undo the irreparable injury to Dr. Hodgson and to the vital public interests which will have been damaged in the interim. The mere fact of a trial and conviction in this case will do such grave and irreparable damage to the federal rights involved, that a final judgment permitting such a trial is appealable to this Court.

Avoidance of extraordinary irreparable injury is one justification for treating the state judgment denying prohibition as final. In the usual criminal case, denial of prohibition affects no one but the accused, and leaves open the possibility of acquittal at the trial. Here, conviction is a foregone conclusion. Responsibility under state law is not denied. Only the validity of that state law is in question. In fact, at the time the application for prohibition was made, the trial court had already sustained the constitutional validity of the statute. Only the formality of conviction and sentencing remains before a possible appeal to the Supreme Court of Minnesota. Nonetheless, that court refused to consider the possibility that a decision by it could protect the rights of those to be affected in the interim.

The serious and irreparable injury in the interim delay should not be overlooked. Efforts by married couples and single women to obtain hospital therapeutic abortions are by no means rare. Indeed, during the first two months of New York's recent change to privacy in this regard, over 18,000 abortions were recorded in New York City alone.[50] Where abortion is not available in hospitals, these same individuals will resort to back-street practitioners, midwives, dangerous drugs, and self-abortion. If Appellant is correct in asserting that couples have a constitutional right to freedom from compelled continuation of pregnancy, then vindication of that right should not be unduly delayed. Justice delayed, under these circumstances, is truly justice denied.

Considerations of judicial economy, echoed in the more recent decisions by this Court on finality, justify immediate review. The "roundabout process" of a futile trial "would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Mills* v. *Alabama,* 384 U.S. 214, 217-18 (1966). Appellant asserts a right not to be tried at all under a statute unconstitutional on its face. If Appellant is correct, a trial will be carried out in violation of the Constitution. In particular, the privacy of Jane and John Doe will be irretrievably invaded by the exposure of exceedingly personal matters of family choice and planning to the glare of publicity.

Madruga v. *Superior Court,* 346 U.S. 556 (1954), and other cases support this conclusion. In *Madruga,* a state trial court issued a preliminary determination that it had jurisdiction over an admiralty claim. Defendants sought

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[50] *See* N.Y. Times, Sept. 17, 1970, at 43, col. 3.

prohibition in the Supreme Court of California, claiming that jurisdiction was exclusive in the federal forum. The writ was denied, and an appeal to this Court under 28 U.S.C. §1257 was held to lie, although no trial had taken place. While *Madruga* challenged the basis of state court jurisdiction in light of federal statutes, Appellant in the present case claims more, that the federal Constitution deprives the Minnesota trial courts of jurisdiction to proceed any further. If Appellant is correct, a trial would be an exercise of force, unsanctioned by the rule of law. As far as the highest court of Minnesota is concerned, however, the trial may proceed.

Also in line with *Madruga* are *Mercantile Bank* v. *Langdeau*, 371 U.S. 555 (1963), and *Local No. 438* v. *Curry*, 371 U.S. 542 (1963), followed by Mr. Justice Goldberg as Circuit Justice in *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1 (1965). The analysis by Justice Goldberg is particularly in point:

> "Here, as in Curry, there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts; (2) a threat of serious erosion of national policy [due process]; and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case. Langdeau held final a preliminary determination of venue which would have led to a totally unnecessary trial, where the federal right asserted was precisely one not to stand trial at all . . . ." 86 S. Ct. at 3.

On each point the present case is the same. Here there have been: (1) a final assertion of jurisdiction to proceed with the trial, and no possibility of further review of that issue in the state courts; (2) a threat of serious erosion of

national policy [federal constitutional rights of privacy]; and (3) a state judgment sustaining the facial validity of the statute, an issue unrelated to the individualized circumstances of the case. Moreover, Dr. Hodgson asserts the same right not to be tried as did Langdeau. To vindicate that right, this Court should accept as "final" the judgments in the State courts, and review this case on its merits.

CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction, and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX A: STATE PROCEEDINGS

Notice of Appeal to the Supreme Court of the United States From the District Court, Second Judicial District, County of Ramsey, State of Minnesota, Filed September 14, 1970

DISTRICT COURT
STATE OF MINNESOTA

COUNTY OF RAMSEY—SECOND JUDICIAL DISTRICT

File No. 23789

STATE OF MINNESOTA,

Appellee,

vs.

DR. JANE ELIZABETH HODGSON,

Appellant.

1. Notice is herewith given that the above-named Appellant appeals the final judgment of the Minnesota Supreme Court entered July 20, 1970, denying an application for a writ of prohibition.

2. This appeal is taken to the Supreme Court of the United States pursuant to 28 U.S.C. §1257(2).

3. Appellant respectfully requests the Clerk of Ramsey County District Court to prepare a certified copy of the entire record herein, in the manner specified by Rule 12, Rules of the Supreme Court of the United States, as revised July 1, 1970, and to transmit said record to the Supreme Court of the United States for timely docketing of this appeal.

Dated: September 14, 1970.

Order of the Supreme Court of Minnesota, Denying Application for Writ of Prohibition, Entered July 20, 1970

IN

SUPREME COURT
STATE OF MINNESOTA

42652

STATE OF MINNESOTA,

Respondent,

vs.

DR. JANE E. HODGSON,

Petitioner.

ORDER

IT IS ORDERED that petitioner's application for a writ of prohibition dated July 17, 1970, as stated therein be, and the same hereby is, denied.

Dated: July 20, 1970.

BY THE COURT

OSCAR R. KNUTSON
Chief Justice

Order of the District Court, Second Judicial District, County of Ramsey, Denying Motion to Dismiss Indictment Against Appellant Jane E. Hodgson, M.D., Entered June 29, 1970

DISTRICT COURT
STATE OF MINNESOTA

COUNTY OF RAMSEY—SECOND JUDICIAL DISTRICT

File No. 23789

STATE OF MINNESOTA,

vs.

DR. JANE ELIZABETH HODGSON.

The defendant is accused by the grand jury of the County of Ramsey in an indictment returned on May 21, 1970, of the crime of abortion, in that she, the defendant, intentionally produced a miscarriage of one, Jane Doe, which said miscarriage was not necessary to preserve the life of the said Jane Doe nor the child with which she was pregnant. The defendant's first appearance in court was on May 26, 1970, at which time she appeared with her Counsel, Stewart R. Perry, and indicated to the Court that her appearance was a special appearance for the purpose of moving the Court for an order dismissing the indictment for the reason and upon the ground that the statute under which the indictment was returned was unconstitutional. The date of June 12, 1970, was then set as the time for hearing, and the requests to file briefs by both the State and the defendant were granted by the Court.

On June 12, 1970, the defendant, together with her Counsel, appeared before the Court to argue the above described motion. The County Attorney was represented by Mr. Paul Lindholm, Assistant Ramsey County Attorney. In the interim, briefs had been submitted by Mr. Perry and by Mr. Stephen C. DeCoster, Assistant Ramsey County Attorney.

Upon all of the files, records, and proceedings had and filed in said matter, briefs and arguments of Counsel, and after due consideration of the same,

IT IS ORDERED:

1. That the motion brought by defendant to dismiss the indictment returned against her in the above entitled matter be and the same hereby is denied.

2. That the request of the defendant to certify the above entitled matter to the Supreme Court of the State of Minnesota as important and doubtful be and the same hereby is denied.

3. That the defendant will appear before the Court on August 5, 1970, prepared to proceed with her arraignment.

(Signature Illegible)
Judge of the District Court

Dated June 29, 1970.

MEMORANDUM

The statute in question, MSA 617.18, was first enacted into law by the Minnesota legislature in the year 1873. As far as can be ascertained, this is the first constitu-

tional challenge of the statute, and the issues presented in this motion have not been decided in this jurisdiction. The Court has taken judicial notice of the materials cited in the briefs, but they are of such common understanding that they need not be elaborated on here in great detail.

The undisputed facts appear to be that Jane Doe, a married woman, of the age of 23 years, was a patient of the defendant, and on April 14, 1970, was diagnosed as being pregnant. From the medical history obtained, it was suspected that Jane Doe had contracted rubella during the first four weeks of her pregnancy, and that Jane Doe had come to the defendant because she suspected that she had rubella during that period of time. She was apprehensive about her condition, particularly her unborn child, because of her knowledge of the dangerous propensities of the disease. The history of rubella given by Jane Doe was confirmed by clinical observations and laboratory tests on two of her children who at that time had the disease, the examination and tests being performed by a pediatrician located in Minneapolis, Minnesota. Upon the tests having been made, together with examinations in connection therewith, the defendant was of the opinion that Jane Doe had rubella during the first four weeks of her pregnancy. Jane Doe and her husband were aware of the danger to the fetus because of the contraction of the disease and requested the defendant to perform an abortion. The defendant believed in her medical judgment that a therapeutic abortion was medically indicated, and she secured consultations from other members of her profession in the community and in other parts of the United States, resulting in the performance of the abortion in a hospital located in Ramsey County, Minnesota, on April 29, 1970. At that time Jane Doe was about 12

weeks pregnant, and the fetus was not viable or "quick." Before proceeding with the operation, the defendant brought a motion in the United States District Court, District of Minnesota, seeking, essentially, the same relief here presented. A three-judge court denied the motion of the defendant and indicated that she seek her relief in the courts of the State of Minnesota. Because of the lack of time, the defendant proceeded with the operation, rather than first seek her relief in the district courts of the State.

The issues presented cover three, general, broad areas. First, whether or not the State has the right to interfere with the private rights of an individual; two, if the State does have such right, it must have an overriding and compelling interest to justify any such interference with the private life of an individual; and, three, if there is an overriding State interest present today that justifies the existence of MSA 617.18, it is incumbent upon the State to establish such interest.

The Court will touch upon the constitutional issues raised by defendant as they pertain to these three general areas.

Defendant contends that the statute infringes upon the personal liberties of the individual concerned, in that it interferes with a woman's right of privacy in determining whether she will or will not, or should or should not, allow to grow within her body embryo which she does not wish to grow, and that in order for the State to interfere, there must be shown a reasonable basis, an overriding justification, a social purpose of such interference. Defendant further contends that at the time of its enactment, in the year 1873, there was an urgent and well-founded health basis for its passage. Any surgical intrusion into the body

was, at that time, highly dangerous. Infection was almost insured, and mortality was high. Defendant argues that today an abortion performed under proper circumstances is a reasonably safe procedure, even safer than normal childbirth. No doubt these considerations were in the mind of our legislators almost a century ago when the law was first enacted. However, the statute has been periodically reconsidered over the years, most recently at the last legislative session. Whatever the dangers of surgery the legislators might have had in mind during the early years of the history of this law, those considerations have seemed [*sic*] to have disappeared during recent years, and the law is still on the books. The reason for its existence is not because of dangers of surgery or performing an abortion, medically speaking. Some considerations for the continued existence of the law are hereinafter discussed.

Defendant places great emphasis on the fact that the State of Minnesota has never considered an embryo or fetus as a "human being." Defendant further contends that the statute in question denies the rights of the Father or the Mother of the aborted foetus to privacy in contravention of the Ninth and Fourteenth Amendments to the United States Constitution. There is authority to the effect that the unborn child, even before it becomes viable, is an entity which the legislature is empowered to protect. In early recorded history, the child in the Mother's womb was considered a part of its Mother. Reference is made to Roman law, see Justinian, Digest 25.4.1.1. But since that early date we have seen the development of scientific methods to such an extent that the ancient law has been reconsidered, and no longer is the fetus considered to be a plant, static in habit, and growing only in size. Through the marvels of closed-circuit x ray and television, scientific observations of

this little human being during his first weeks of existence have been made possible. Studies of mental growth have been made possible, during the first few weeks of the child's existence. Some studies have indicated that even in the limb bud stage, when the embryo is only four weeks old, there is evidence of behavior pattern: the heart beats. In two or more weeks, slow back and forth movements of the arms and legs appear. Before the 12th week of uterine life, the fingers flex in reflex graphs. From the studies of certain child psychologists, it has been disclosed that the process of mental development which characterizes a 10-year old child or the one-year old child also characterizes the embryo who might be only one month old. Hence, it would appear that the time has been reached when society must discard the theory advanced by the old Roman law, that a parent has an absolute dominion over his offspring, or a return to the ancient notion that a fetus is "part" of his Mother. The Minnesota legislature has made no such distinction, nor has it attempted to set out by law at what stage during pregnancy a child may be considered "quick" or "viable" nor has it at anytime determined at what stage during pregnancy the life of a child can or could be taken for any reason or means. Rather, the legislature has decreed that a miscarriage shall not be caused at anytime during pregnancy unless the same is effected as necessary to preserve the life of the Mother or the life of the child. The State has an interest in the continued existence of every life.

Defendant contends that unless the fetus in question is "quick" or viable, the unborn child has no legal rights in the State of Minnesota. The rights of the unborn child are specifically recognized by Minnesota law in its various

fields, such as: intestate succession; testate successions; trusts and uses; workmen's compensation; paternity and support; land registration; and future interests in real property. Various quotations make reference to "unborn child" and "posthumous child," "lives in being," "twenty-one years and nine months," but the law is entirely lacking with respect to definitions of "quick child" or "viable child." The Court recognizes there are rules and regulations promulgated by the State Department of Health pursuant to MSA 144.151 (4) to the effect that destroying a fetus is not considered a fetal death if aborted for any reason less than 20 weeks after conception. See Registration Manual for Birth and Fetal Death, State Board of Health (1965), Section 5, page 14. However, such regulations and publications are not considered decisive case law, nor are they controlling in the instant matter. Turning our attention to the field of tort law, the first time that the Minnesota State Supreme Court was called upon to pass upon the issue of the right of the heirs of an unborn child to recover in a wrongful death action was in 1949. See *Berkenes* vs. *Corniea* (1949) 229 Minn. 365, 38 N.W. (2) 838. It is noted that the Court, in part of its opinion, quoted Blackstone as follows:

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. Life is the immediate gift of God—a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the Mother's womb."

The Court further quotes the case of *Bonbrest* vs. *Kotz* (D.C.) 65 Fed. Supp. 138:

> "From the viewpoint of the civil law and the law of property, a child en bentra [*sic*] sa mere is not only regarded as a human being, but as much [*sic*] from the moment of conception—which it is in fact."

While it is true that the child in the Berkenes case had reached a viable state, it is noted that the Court made no distinction between a viable or nonviable child, that is, it does not appear that had the child not been viable, recovery would have been denied. There is substantial authority in other jurisdictions which allow recovery for prenatal injuries to nonviable, unborn children. There appears to be no holding or decision to the effect that would allow a shifting of standards in certain cases. There appears to be no reason to allow a distinction to be made, based upon age of the child within the womb. The dean of tort law, Professor Prosser, states at Section 56:

> "Certainly the infant may be no less injured, and all logic is in favor of ignoring the stage at which it occurs."

If the State legislature has seen fit to give the right of recovery to an unborn child or his heirs at various stages during pregnancy in the civil field, why should the child be abandoned at certain stages of pregnancy in the criminal field? If the unborn child at age 12 weeks within the womb has vested rights or the right in certain instances to recover, as hereinabove set forth and described, why should any person be deemed competent to judge that the child's twelve-week life may be taken because of the wishes of its Mother or Father, or because it is unwanted, or because of the possibility of its being deformed or handicapped because

of exposure to certain diseases during the early stages of life? Defendant would ask this Court to so legislate, contrary to what has taken place in the halls of our legislature for generations past. For the reasons hereinafter enumerated, this Court does not so choose to do.

Defendant alleges that the statute in question, MSA 617.18, today is based on the concept of "morality and decency" arising from religious laws in violation of the First Amendment to the United States Constitution. Defendant then points out that these individuals who rely on the position of morality and decency overlook the end results where abortion is not allowed. That is to say, they overlook those children who are being born with gross defects, who must live with them day by day, while those who would preach morality and decency are prompted by it only on occasions where their attention is drawn to what someone else is doing. Defendant further points out that these people overlook the institutions in Minnesota filled with mentally retarded people whose life is tragic, and that they overlook the daily pain that the parents and siblings of such children live, day by day. They further overlook the unwanted children in institutions and overlook the children who are periodically in hospitals with the "battered child syndrome." Defendant contends that it is immoral and indecent not to prevent this, and that it is immoral and indecent to force these institutions to exist.

Where the statute involved deals with conduct which the State has valid grounds to prohibit, that is, the taking of the life of an unborn child, the fact that its policies coincide with the views of certain religious groups is without constitutional significance. It is almost inevitable that any position taken by the State through its legislature on the

subject of abortion must correspond with the religious or moral views of some group or groups within the community. In passing such a law, the legislature did not intend that it establish a religion in contravention of the First and Fourteenth Amendments to the United States Constitution. This subject has been the concern of philosophers and theologians since recorded history has begun. The relationship between religion, morality, and law, perhaps, is difficult to clearly define. However, history teaches that they do overlap in the subjects of their concern. An historical study of the works of our legislative bodies will clearly indicate that many men in their respective roles as legislators were committed to the proposition that the ultimate source of law is from the ultimate Lawgiver Himself. Many have clearly indicated that a just law binds one's conscience, and if a law does not bind one in conscience, it should not be law. There are numerous references in the Old Testament as to the source of our law, among which are the Book of Proverbs, Chapter 8, and Exodus, Chapter 24. Five thousand years ago Hammurabi recognized a supernatural source of authority, and the same reference is also made to Solon, the great leader of freedom-loving Greeks. It seems that down through the centuries, men have further recognized the authority for law and would keep those convictions alive in various forms in the halls of their legislatures. Seven hundred years ago Henry Bracton wrote:

> "The king is under God and the law. When the king or dictator or the State is held above God and the law, liberty is never secure, and the rights of man are mere franchises subject to the whims of other men."

In more modern times these same thoughts might have inspired our great leaders, such as Thomas Jefferson, when he wrote:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."

Society would reach a strange position in its history if the legislatures of the several states were forbidden from making illegal that which is also immoral according to one's religion, or, indeed, all religions, on the grounds of the establishment clause of the First Amendment. Under such restrictions society might then return to a state of chaos, even barbarianism. The Court recognizes the sincere views of the defendant in this field, and the remarks hereinabove set forth are not in criticism or ridicule of those views or beliefs. The Court is also cognizant of the views of the minority in our various communities who have views which coincide with those of the defendant in this area. However, to give effect to those views of the defendant or the minority, the Court again is called upon to legislate, and for the reasons hereinafter set forth, the Court will not undertake such a responsibility. The Court is also not unmindful of the anxiety of the Mother in this case. Having been exposed to German measles, she was apprehensive of the possibility of bearing or giving birth to a deformed or handicapped child. Instead of agreeing to take the child's life because of this possible exposure, might she not have at least better yielded to the argument of a segment of our society who would state:

> "Let the child run its normal period of gestation, and upon birth if it is found that the child will be a burden to its parents or society, then provisions may be taken for its destruction."

The very thought of such argument, perhaps, appears abhorrent to responsible members of our community, but wherein lies the difference? At what stage in the course of human existence, or development, can it be decreed that life should be taken because of the potential inability to perform as normal persons are expected? Society is increasingly concerned with those who have been blessed with healthy bodies, and prefer to serve themselves, and blame society, rather than serve society and honor themselves. Society has never forgotten, nor should it ever forget, that men and women with withered limbs and bodies became outstanding citizens, leaders in their communities, but above all, masters of themselves, while other healthy, vigorous, intelligent individuals, warped within the philosophy of excuse, for one reason or another, have become instruments of their own damnation.

Defendant asserts that the statute in question interferes with the right of privacy of women in violation of the Ninth Amendment to the United States Constitution. The Court agrees that legislation of this type might and can interfere with the right of privacy of certain individuals. This is true with many of the laws of today. A simple illustration concerns the matters of traffic regulations involving the use of a motor vehicle upon the highway. Many such rules and regulations or statutes interfere with the manner in which a person might desire to operate a motor vehicle, but in the protection of life and property, legislative safeguards have been provided, many of which interfere daily

with the rights of individuals. The same problem exists with many other types of legislation. For instance, there are still on the books laws against adultery and fornication, and how intoxicants and narcotics shall be used. These laws are considered by a substantial minority to be archaic in design, and no longer serve a useful purpose in a modern and developing society. However, it is clearly noted that our legislature over the years has not yielded to such arguments and philosophies. This Court does not agree that the statute in question relative to abortion is in violation of the Ninth Amendment of the Constitution of the United States.

Defendant asserts that the statute in question interferes with the right of a medical doctor to practice medicine in the highest standards thereof in violation of the Fourteenth Amendment to the United States Constitution. The Court agrees that the right to pursue one's profession is a constitutionally protected right within the concept of "liberty" and "property." However, it is also noted that medical opinion is divided as to the situations under which a therapeutic abortion is medically indicated. If the State cannot constitutionally regulate the exercise of that judgment, legislators and courts alike would be superfluous, supplanted by a wise elite of doctors. In a democratic society, trust cannot be placed with a body of experts to determine issues of life and death, however qualified, well-motivated, and devoted the experts may be.

Defendant further contends that the statute delegates to the physician the duty and risk of deciding whether the abortion is necessary to preserve the life of the Mother or child and thus violates the Fifth and Fourteenth Amendments to the United States Constitution. Defendant points out the difficulty here is that the doctor must decide

whether or not the abortion is necessary to preserve the life of the patient, and she apparently has difficulty interpreting the word "preserve." Defendant alleges that it is incumbent upon her to make the right decision as to whether or not an abortion is necessary to preserve the life and is thus placed in a conflict of interests; that is, caught between the decision to do the abortion and the fear that if something should go wrong, the matter would be brought to the attention of the police. Thereafter, the doctor must then justify her opinion at a trial. Hence, she jeopardizes her practice and runs the risk of prosecution whenever the decision is made to perform an abortion, where there is any question that medical opinion could differ as to whether or not the operation was necessary to preserve the life of the Mother or the child. This Court, upon examination of the statute, is not persuaded that the words are indefinite or vague. In the Court's opinion, the word "necessary" and the expression "to preserve the life of the Mother" are both reasonably comprehensible in their meaning. The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. See *Lanzetta* vs. *New Jersey,* 306 U.S. 451, 59 S. Ct. 618, 83 L. PB. [*sic*] 888 (1939). And also see *Connolly* [*sic*] vs. *General Construction Company,* 68 [*sic*] U.S. 385, 46 S. Ct. 126, 17 L. PB. [*sic*] 322 (1926). This Court is of the opinion that the statute sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. It is interesting to note that the defendant challenges the words "necessary to preserve her life" as being vague. The Court is not unmindful that the dedicated medical profes-

sion assumes this responsibility without hesitation almost daily in its various practices. It is deeply interesting to note that the statute in question has been law for a period of almost 100 years, and until the present time no one has challenged the provisions of the statute as being indefinite or vague. The Court cannot agree with the defendant that the statute involves a delegation of legislative responsibility. The legislature has simply set a certain standard, and that is, that no abortion shall be carried out unless necessary to preserve the life of the Mother, and then requires that the individual condition his or or her conduct on a respect for the standard as set. It would appear that the requirements laid out are no more burdensome than those which are established by any criminal law. Such a requirement placed upon the individual is, in no sense, a delegation of legislative responsibility.

The State contends that there are valid policy reasons underlying the statute in question; therefore, the doctrine of separation of legislative and judicial functions and the long-settled judicial rule of reticence in substituting the Court's own notions of legislative wisdom for that of a democratically elected legislature dictate that the challenged statute be sustained. The question of the validity of anti-abortion legislation is not the only issue of importance here. The issue of separation of legislative and judicial functions is as well involved. Even though a court may go so far as to opine that a particular statute in question be unwise, silly, or even asinine, if it has been demonstrated that the statute in question is reasonably tailored to the protection of societal interests with respect to which the legislature is entitled to act, then such act should not be torn down by a court who differs in opinion, philosophically or socially. This does not mean that there are

not policy grounds for a change in abortion laws which were ably stated in defendant's brief and exhibits. What it does mean is that these arguments are more properly addressed to the legislature of this State, and ultimately to its people. This Court is asked to balance the rights of an unborn child against the rights of the Mother, contrary to what the legislature has so consistently stated. Whose rights shall transcend? Who shall balance the relevant interests? This Court is of the opinion that the problem of balancing is more properly the function of the legislature and of the people of the respective states. In the case of Commonwealth vs. Brunell [*sic*], not yet reported, the Court stated:

> "The subject of abortion has become one of the most controversial social and legal issues of our contemporary society. Reasonable arguments have been advanced both in favor of and against abortion. But when a question is fairly debatable, the courts cannot substitute their judgment on it for that of the legislature." Citing *Druzik* vs. *Board of Health of Aberhill,* 324 Mass. 129. "It is only when a legislative determination cannot be supported upon any rational basis of fact that a court can strike it down. If the law on abortion is not as responsive to felt needs as the people believe contemporary life demands, the remedy rests with a democratically elected legislature and not with the court."

Defendant requests the Court that the statute in question be found constitutional but to then certify the matter to the Supreme Court of the State of Minnesota pursuant to MSA 632.10 for a determination of the constitutionality of

the statute prior to trial. This would obviate the necessity of raising the defense that she might have, relative to a verdict of innocence or guilt, and would at the same time give statewide effect to the ruling on constitutionality. If the Court in the local instance should find the statute unconstitutional, that ends the matter, and there would be no statewide effect of that local decision. Defendant also points out to the Court that a conviction, including a plea of guilty, would be most serious and would place her professional standing in jeopardy. She feels that if the matter should go to trial at the local level without a Supreme Court determination as to constitutionality, then her whole plan becomes moot inasmuch as she will be put to the task of defending herself against the charge brought by the grand jury, and if she is successful at the trial on the merits, again, the matter would not have any statewide impact.

In the light of the foregoing observations and conclusions drawn by the Court, it is obvious that the matter cannot be certified to the Supreme Court of the State of Minnesota, as important and doubtful. The Court believes that the issue or matter is important, but in this Court's opinion the constitutionality of the act in question is not in doubt. Under the circumstances, the Court has no alternative but to order that this matter proceed pursuant to the ordinary rules and processes of our criminal procedures.

The Court is not unmindful of the standing of the defendant in her community, her reputation as a citizen and as a dedicated physician and surgeon, and the Court is not unmindful of the serious position that she is in pursuant to the charge brought against her. However, it is she who chose to violate the law, and she certainly must have been cognizant of the consequences that might follow. In the

opinion of some of her professional colleagues as well as many in this community she will be considered as a very courageous and dedicated person in choosing the course of conduct that she did. Conversely, there will be other members of her profession and members of our community who do not and will not agree with her. Unfortunately, this Court cannot be a part of any plan or procedure other than those duly provided by law. No exception can be made in any case, even though a court might be in sympathy with the actions taken by the defendant.

The regular and ordinary criminal procedure processes established by law and within this Court's responsibility, require that the defendant be ordered to appear for her arraignment, which has been set for August 5th, next. Defendant will then have to decide whether to bring the matter on for trial relative to the issue of her innocence or guilt of the crime as charged or to enter a plea of guilty, and rest her future standing in the hope that the Supreme Court of the State will take a contrary view to that expressed herein.

HACKEY, *J.*

Indictment by Grand Jury, Filed May 21, 1970

STATE OF MINNESOTA
COUNTY OF RAMSEY

IN THE DISTRICT COURT

SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA

vs.

DR. JANE ELIZABETH HODGSON

DR. JANE ELIZABETH HODGSON is accused by the Grand Jury of the County of Ramsey, by this Indictment, of the crime of Abortion committed as follows:

The said DR. JANE ELIZABETH HODGSON on or about the 29th day of April A.D. 1970, at the City of Saint Paul in said County, then and there being, did wrongfully and unlawfully use the means of a vacuum suction curettage upon a woman, to-wit: JANE DOE, with the intent then and there had and entertained by her, the said DR. JANE ELIZABETH HODGSON, to produce the miscarriage of the said Jane Doe, and the said miscarriage was not necessary to preserve the life of the said Jane Doe or the child with which she was then and there pregnant, contrary to the form of the Statute in such cases made and provided, the same being M.S.A. 617.18 (2)—Abortion,

and against the peace and dignity of the State of Minnesota.

Dated at the City of Saint Paul, in the County of Ramsey and State of Minnesota, this 21st day of May 1970.

Hy Applebaum
Foreman of Grand Jury

APPENDIX B: FEDERAL PROCEEDINGS

Notice of Appeal to the Supreme Court of the United States From the United States District Court for the District of Minnesota, Filed July 23, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

3-70 Civ. 97

JOHN DOE and JANE DOE, JANE E. HODGSON, M.D., MILDRED HANSON, M.D., FRED A. LYON, M.D., and E. J. DIEFENBACH, M.D.,

Plaintiffs,

vs.

WILLIAM RANDALL, Ramsey County Attorney, and DOUGLAS HEAD, Attorney General of Minnesota, and HAROLD DE VANDER, Governor of Minnesota,

Defendants.

NOTICE IS HEREBY GIVEN that the plaintiffs above-named hereby appeal to the United States Supreme Court, pursuant to 28 U.S.C.A. § 1253 from the Order Denying Petition for Rehearing, entered July 1, 1970, said Order relating to the Order of Dismissal entered May 19, 1970, and from the whole thereof and from the judgments entered pursuant thereto.

Order of the United States District Court, Denying a Stay, Entered September 1, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

3-70-Civ-97

JOHN DOE and JANE DOE, JANE E. HODGSON, M.D., MILDRED HANSON, M.D., FRED A. LYON, M.D., and E. J. DIEFENBACH, M.D.,

Plaintiffs,

vs.

WILLIAM RANDALL, Ramsey County Attorney, and DOUGLAS HEAD, Attorney General of Minnesota, and HAROLD LE VANDER, Governor of Minnesota,

Defendants.

STEWART R. PERRY, Minneapolis, Minnesota, *attorney for plaintiffs.*

WILLIAM RANDALL, St. Paul, Minnesota, appeared *pro se.*

JOHN KENEFICK, Assistant Attorney General, St. Paul, Minnesota, *attorney for Douglas Head and Harold LeVander.*

LAWRENCE J. HAYES, LOUIS BRENNER, and DONALD D. WOZNIAK, St. Paul, Minnesota, *attorneys for petitioning intervenors.*

VOGEL, *Senior Circuit Judge,* DEVITT, *Chief District Judge,* and NEVILLE, *District Judge.*

Plaintiffs' "Petition to Stay State Court Proceedings Pending Appeal to United States Supreme Court" filed July 28, 1970, is, on the basis of the files and records herein,

DENIED.

Dated: September 1, 1970.

By the Court:

EDWARD J. DEVITT

Judgment of the United States District Court, Denying Petition for Rehearing, Entered July 1, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-70-97 Civil

JOHN DOE and JANE DOE, JANE E. HODGSON, M.D., MILDRED HANSON, M.D., FRED A. LYON, M.D., and E. J. DIEFENBACH, M.D.,

Plaintiffs,

vs.

WILLIAM RANDALL, Ramsey County Attorney, and DOUGLAS HEAD, Attorney General of Minnesota, and HAROLD LE VANDER, Governor of Minnesota,

Defendants.

YOU ARE HEREBY NOTIFIED that in the above entitled cause on the 1st day of July, 1970, we filed and entered Order Denying Petition for Rehearing.

FRANK A. MASSEY, *Clerk*

By MELODIE D. HICKERSON
Deputy Clerk

To:

Stewart R. Perry
700 NW Federal Building
Minneapolis, Minnesota 55403
Attorney for Plaintiff

Douglas M. Head, *Attorney General*
Richard Kyle, *Solicitor Gen.*
John R. Kenefick, *Spec. Asst.*
160 State Office Bldg.
St. Paul, Minnesota 55101
Attorney for Defendant: Head & LeVander

William Randall, *Ramsey County Attorney,* City Hall
St. Paul, Minnesota
Attorney for Defendant: William Randall

Note: If an appeal is contemplated, the Rules of the United States Court of Appeals and "Suggestions to Attorneys Concerning Appellate Rules & Practice" can be procured from the Clerk, United States Court of Appeals, U. S. Court House and Customs House, St. Louis, Missouri.

Order and Opinion of the United States District Court, Denying Petition for Rehearing, Entered July 1, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

3-70-Civ-97

JOHN DOE and JANE DOE, JANE E. HODGSON, M.D., MILDRED HANSON, M.D., FRED A. LYON, M.D., and E. J. DIEFENBACH, M.D.,

Plaintiffs,

vs.

WILLIAM RANDALL, Ramsey County Attorney, and DOUGLAS HEAD, Attorney General of Minnesota, and HAROLD LE VANDER, Governor of Minnesota,

Defendants.

VOGEL, *Senior Circuit Judge,* DEVITT, *Chief District Judge,* and NEVILLE, *District Judge.*

PER CURIAM.

We dismissed this case on May 19, 1970.

Plaintiffs petition for rehearing.

It is made to appear, by affidavit of plaintiffs' counsel, that a state court indictment has now been returned against plaintiff Jane E. Hodgson charging a violation of the Anti-Abortion Law. It is urged that these changed circumstances merit the granting of a rehearing.

We believe it inappropriate to grant a petition for rehearing upon events which have transpired since dismissal of the action. It well may be that the return of the indict-

ment will support a new and different cause of action, but it does not furnish the basis for a rehearing of the action previously dismissed.

But regardless of this, we do not believe we should grant the rehearing. It appears that, as the result of the return of the indictment, the constitutionality of the Minnesota Anti-Abortion Law now has been put in issue before the Ramsey County State District Court. Arguments have been made and the issue awaits decision. An appeal to the Minnesota Supreme Court is contemplated.

The law specially prohibits our issuing an injunction in these circumstances, 28 U.S.C. §2283; and this prohibition cannot be avoided by the grant of a declaratory judgment because the same principles of comity and federalism pertain. *Brooks* v. *Briley*, 274 F. Supp. 538, 553 (M.D. Tenn. 1967) (a decision of a three-judge court), aff'd per curiam, 391 U.S. 361, 88 S.Ct. 1671 (1968). See also *McLucas* v. *Palmer*, 38 U.S.L.W. 2665 (2d Cir. May 2, 1970).

The United States Supreme Court has counselled us that—

> "Proceedings in the state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately to this court."
>
> *Atlantic Coast Line RR Co.* v. *Brotherhood of Locomotive Engineers*, 477, October Term, 1969 (U.S., June 8, 1970).

This very recent decision re-emphasizes the settled federal practice of maintaining a hands-off policy as to pending state court proceedings.

The petition for rehearing is

DENIED.

Dated: July 1, 1970.

CHARLES J. VOGEL
Senior Circuit Judge

EDWARD J. DEVITT
Chief District Judge

PHILIP NEVILLE
District Judge

VOGEL, *Senior Circuit Judge* (concurring separately):

I agree with the court's present opinion. I am, however, compelled to add a word to make clear my prior dissent when this case was dismissed. Once an indictment is returned, I feel the statutory mandate of 28 U.S.C.A. § 2283 and the principles of comity require a federal court to abstain. A court of competent jurisdiction then has control of the controversy. In such cases, I believe our jurisdiction is limited only to bad faith prosecutions directly affecting the exercise of First Amendment freedoms. *Cameron* v. *Johnson*, 1968, 390 U.S. 611; *Dombrowski* v. *Pfister*, 1965, 380 U.S. 479. The recent pronouncement of the Supreme Court lends credence to this view. See *Atlantic Coastline* v. *Engineers*, No. 477 —— U.S. ——, June 8, 1970. Moreover, as a practical matter, once a state court has taken jurisdiction of a constitutional issue fully litigated before it, I have grave doubts that a Three-Judge Court may ever take the case without forcing plaintiff to waive his consti-

tutional claims in the state courts. See *England* v. *Medical Examiners,* 1964, 375 U.S. 411.

Prior to indictment, however, I believe the federal court is allotted more leeway to intervene. So long as the plaintiff alleges violations of federal rights coupled with irreparable harm, I see no reason to stay our hand when the state law is clear and unambiguous. See *Harmon* v. *Forssenius,* 1965, 380 U.S. 528; *Davis* v. *Mann,* 1964, 377 U.S. 678, 690; *U. S. Steel Workers* v. *Bagwell,* 4 Cir., 1967, 383 F.2d 492, 495.

With these reservations and explanations, I fully concur in the present result.

Judgment of the United States District Court, Denying Declaratory Judgment and Injunction, and Dismissing Complaint, Entered May 19, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-70-97 Civil

JANE DOE, *et al.*,

Plaintiffs,

vs.

WILLIAM RANDALL, etc., *et al.*,

Defendants.

YOU ARE HEREBY NOTIFIED that in the above entitled cause on the 19 day of May, 1970, we filed the Court's Order of Dismissal, and entered judgment pursuant thereto.

FRANK A. MASSEY, *Clerk*

By Lawrence R. Tapper
Deputy Clerk

To:

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Ramsey County Courthouse
St. Paul, Minn. 55102
Attorney for deft. Randall

Note: If an appeal is contemplated, the Rules of the United States Court of Appeals and "Suggestions to Attorneys Concerning Appellate Rules & Practice" can be procured from the Clerk, United States Court of Appeals, U. S. Court House and Customs House, St. Louis, Missouri.

Order and Opinion of the United States District Court, Denying Declaratory Judgment and Injunction, and Dismissing Complaint, Entered May 19, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

3-70-Civ-97

JOHN DOE and JANE DOE, JANE E. HODGSON, M.D., *et als.*,

Plaintiffs,

vs.

WILLIAM RANDALL, Ramsey County Attorney, and DOUGLAS HEAD, Attorney General of Minnesota, and HAROLD LE VANDER, Governor of Minnesota,

Defendants.

VOGEL, *Senior Circuit Judge,* DEVITT, *Chief District Judge,* and NEVILLE, *District Judge.*

DEVITT, *Chief Judge.* In this action for a declaration of unconstitutionality of the Minnesota Anti-Abortion Statutes, M.S.A. 617.18 and 617.19, and for an injunction against their enforcement, the defendants move for dismissal.

Plaintiff Jane E. Hodgson, a medical doctor, performed an abortion upon plaintiff Jane Doe (a fictitious name), then about 12 weeks pregnant, in St. Paul, Minnesota on April 29, 1970.[1] It is alleged that Jane Doe was exposed to

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[1] This appears from an amended and supplemental complaint of plaintiffs. The Court allows its filing. The original complaint, challenging the unconstitutionality of the Anti-Abortion Statutes, was filed on April 16, 1970, before the abortion was performed.

rubella (German measles) during pregnancy, and that such exposure created a substantial probability of foetal deformity to the expected child.

Minnesota law makes it a crime to occasion an abortion or to submit to an abortion except it be necessary to preserve the life of the mother or child. M.S.A. 617.18, 617.19.

Plaintiff John Doe (a fictitious name) is the husband of Jane Doe. The other three plaintiffs are medical doctors.

Defendant William Randall is the State prosecuting officer of Ramsey County, within which the City of St. Paul is located. It is his duty to prosecute violations of the state criminal laws. The Governor and Attorney General of Minnesota are also named defendants.

Four medical doctors practicing their profession in Minnesota, Fred E. Mecklenburg, Paul H. Andreini, Alex Barno and John McKelvey, seek to intervene in support of the constitutionality of the Anti-Abortion statutes.

Several motions pend. We first consider defendants' motion to dismiss.

Two major objections are urged by the State of Minnesota and its officers to our entertaining this action. First, it is urged that it is improper for the Federal Court to act in this state criminal matter, and that we should therefore apply the doctrine of abstention. Secondly, it is urged that there is an absence of the required "case or controversy" under the United States Constitution and of a "justiciable controversy," under the Declaratory Judgments Law.

Federal policy is opposed to Federal intervention in State affairs. The Congress has expressly prohibited the issuance of an injunction, "to stay proceedings in any court of the State." 28 U.S.C.A. 2283. This has been the statutory law of the United States since 1793. (Act of March 2, 1793, Chapter 22, Sec. 5; also found in 1 Stat. 344.)

While this Anti-Injunction Statute does not prohibit an injunction against a state officer who is about to institute criminal proceedings to enforce an unconstitutional statute where a "chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution unaffected by the prospect of its success or failure," *Dombrouski* v. *Pfister,* [*sic*] 85 S.Ct. 1116 at 1121, 1965, it is clear that no such "chilling effect" under the First Amendment is present in this type of action. That was the holding of the United States District Court for the Eastern District of Wisconsin in the case of *BAbbitz* v. *McCann,* [*sic*] unreported, filed on March 5, 1970. That court refused to issue an injunction.

There has been a consistent and traditional reluctance by the Federal Courts to interfere in State criminal proceedings as is amply reflected in a long line of Supreme Court decisions. *Douglas* v. *City of Jeannette,* 1943, 63 S.Ct. 877; *Pugach* v. *Dollinger,* 1961, 81 S.Ct. 650; *Cleary* v. *Bolger,* 1963, 83 S.Ct. 385. See also numerous cases cited in 1 Barron and Holtzoff (Wright Ed.), Section 46 at n. 96.

In the most recent expression on the subject, the United States Supreme Court, in *Dombrouski,* [*sic*] *supra,* said:

> "The Court has recognized that Federal interference with a State's good faith administration of its criminal laws is peculiarly inconsistent with our Federal framework. It is generally to be assumed that State Courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly State proceedings."

The same principle was expressed earlier by the High Court in a decision written by Mr. Justice Whittaker, *Wilson* v. *Schnettler,* [*sic*] 365 U.S. 381 (1961), also involving a requested injunction against a suggested State prosecution under the State criminal laws.

The Court there said:

> "We live in the jurisdiction of two sovereigns. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted . . . Federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which are for the interposition of a court of equity to prevent irreparable injury which is clear and imminent.'" *Douglas* v. *City of Jeannette,* 319 U.S. at 163.

The exception here noted, to "prevent irreparable injury" is not present in a case such as this, according to the *Dombrouski* [*sic*] Court, as quoted supra.

The second suggested objection to the maintenance of this action under the Federal Declaratory Judgments Law is the absence of a "case or controversy" as that term is used in the United States Constitution, Article III, Section 2, or of a "justiciable controversy" as both of those terms have been defined by numerous decisions of the United States Supreme Court. See Particularly *Public Service Commission of Utah* v. *Wycoff Company,* 344 U.S. 237 (1952), and *United Public Workers of America* v. *Mitchell,* 330 U.S. 75 (1947).

We fully subscribe to this suggested infirmity in plaintiffs' asserting their claims here. In addition, the Declaratory Judgments Act specifically requires an "actual controversy," 22 U.S.C.A. 2201. Also, the discretionary authority of the Court to entertain an action is implicit in the use of the word "may." See *Mitchell* v. *Donovan*, 300 F. Supp. 1145 at p. 1147, 1148, argued and awaiting decision in the United States Supreme Court, for a fuller exposition of our views.

It will be recalled that in all the recent cases from other jurisdictions involving the constitutionality of Abortion Statutes, to wit, in California, *People* v. *Belous*, 458 P.2d 194; in Wisconsin, *Babbitz* v. *McCann* (E.D. Wis.) filed March 5, 1970; in the District of Columbia, *United States* v. *Vuitch*, 305 F. Supp. 1032 (1969); in Massachusetts, *Commonwealth* v. *Brunelle*, Sup. Court #83879; and in South Dakota, *State* v. *Munson*, unreported, 4/10/70; there was an actual "case or controversy," and a "justiciable controversy," clearly presented by the return of an indictment. Such is not the case here. No indictment has been returned.

It is also noteworthy that all of these cases were decided by the State Courts except *Babbitz* v. *McCann*, and there the Federal Court refused to enjoin a state criminal prosecution.

It appears that the plaintiffs' counsel is seeking relief for his client in the wrong court. Involved is a state statute, a state Governor, a state Attorney General, a state prosecutor, and a state policy of law enforcement upon which the federal courts may not with impunity impinge.

There are highly competent state judges fully qualified and available to pass on this state-oriented issue, and each

of those judges is as fully committed as we to upholding the United States Constitution.

There is an adequate state statute, the Declaratory Judgments Act, M.S.A. 555.01, et seq. under which the plaintiffs may obtain the requested relief and the decision thereon will "have the force and effect of a final judgment."

Thus adequate relief is available to plaintiffs either through the State Declaratory Judgments Act or through the State Courts in a criminal prosecution if one is instituted. We have every confidence that plaintiffs' constitutional claims will be fully and fairly considered and decided by the state courts.

We are satisfied that the Federal court should not assert jurisdiction either to make a declaration as to the constitutionality of the Minnesota Statutes or to enjoin possible state criminal prosecution under them.

The complaint is

DISMISSED.

EDWARD J. DEVITT
Chief District Judge

Dated: May 19, 1970.

.....
District Judge

Senior Circuit Judge Vogel dissents.

NEVILLE, *District Judge.*

I concur in the result because I believe there is no "case or controversy" within Article III § 2 of the United States Constitution, nor is there an "actual controversy" under 28 U.S.C. § 2201, the declaratory judgment statute.

Insofar as the majority opinion is bottomed on the doctrine of "abstention", however, I hesitate to agree. Had the abortion not been performed, the question would not have become moot and thus a justiciable controversy would exist. I would under those circumstances hold that under the philosophy and teachings of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Zwickler* v. *Koota,* 389 U.S. 241 (1967), and other cases, the doctrine of abstention should not serve as a bar, and the court had ought [*sic*] to take jurisdiction of the cause. In the present posture of the case, however, we are in reality asked to do nothing but render an advisory opinion. The exigency has disappeared and the irreparable harm contemplated, if such it be, has gone.

Once a state criminal prosecution is commenced, it may or may not be that 28 U.S.C. § 2283 will prohibit federal interference with prosecutions brought under state criminal laws. Prior to any such prosecution, however, I subscribe to the view that the entire medical profession and innumerable pregnant women live under the sword of Damocles. The exercise of their best medical judgment, the giving of advice and the pregnants' freedom of choice is "chilled" by the cloud of a statute which renders their actions illegal and puts them in jeopardy of criminal prosecution with the resultant publicity, possible public disgrace, loss of hospital privileges, threatened license revocation, etc. The constitutionality of the statutes was properly brought into the federal forum for a determination, but now I agree must be dismissed but only for lack of a justiciable controversy.

APPENDIX C

Text of Related Minnesota Statutes

40A MINN. STAT. ANN. § 617.20, at 287 (1964):

"Whoever shall manufacture, give, or sell an instrument, drug, or medicine, or any other substance, with intent that the same may be unlawfully used in producing the miscarriage of a woman, shall be guilty of a felony."

40A MINN. STAT. ANN. § 617.25, at 27 (Supp. 1970):

"Every person who shall sell, lend, or give away, or in any manner exhibit, or offer to sell, lend, or give away, or have in his possession with intent to sell, lend, give away, or advertise or offer for sale, loan, or distribution, any instrument or article, or any drug or medicine for causing unlawful abortion; or shall write or print, or cause to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or shall give oral information, stating when, where, how, or whom, or by what means such article or medicine can be obtained or who manufactures it, shall be guilty of a gross misdemeanor and punished by imprisonment in the county jail for not more than one year or by a fine of not more than $500 or both."

11 MINN. STAT. ANN. § 144.55, at 31 (Supp. 1970):

" . . . The state board of health may refuse to grant, refuse to renew, or may suspend or revoke a license on any of the following grounds: . . .

(2) Permitting, aiding, or abetting the commission of any illegal act in [the hospital or other institution holding a license granted by the state board of health]."